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SU'OT TEBARI v. LAND CUSTODY AND DEVELOPMENT AUTHORITY (LCDA) & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MARY LIM JCA
S NANTHA BALAN JCA
B ISMAIL BRAHIM J
[CIVIL APPEALS NO: Q-01(IM)(NCvC)-521-08-2018 &
Q-01(IM)(NCvC)-579-09-2018]
24 SEPTEMBER 2020

C ***CIVIL PROCEDURE:*** *Striking out – Appeal against – Land matter – Dispute over proprietorship of land – Claim time-barred and disclosed no reasonable cause of action – Whether matter ought to be struck out and summarily disposed – Rules of Court 2012, O. 14A & O. 18 r. 19*

D ***CIVIL PROCEDURE:*** *Summary judgment – Appeal against – Land matter – Dispute over proprietorship of land – Claim time-barred and disclosed no reasonable cause of action – Matter struck out and summarily disposed – Whether matter suitable for summary disposal – Rules of Court 2012, O. 14A*

The appellant ('plaintiff'), a native of Sarawak and of Lun Bawang race,
E commenced a claim at the High Court, on behalf of himself and his three siblings, seeking a declaration that he had acquired or inherited native title and/or native customary rights ('NCR') over four parcels of Temuda land ('NCR lands'). The plaintiff also sought an order that the title held by the Land Custody and Development Authority ('third defendant') over one of
F the lots ('Lot 349') in the NCR lands was unlawful, null and void. The third defendant applied for the determination of the following questions of law: (i) whether the third defendant, being the registered proprietor of Lot 349, had indefeasible rights over the said land against the plaintiff's alleged NCR claim ('question (i)'); (ii) if question (i) was answered in the positive, whether the plaintiff could apply for or be entitled to the remedies, reliefs or orders
G prayed for against the third defendant's title; and (iii) whether the plaintiff's claim and reliefs sought were barred by s. 2 of the Public Authorities Protection Act 1948 and/or items 29, 72, 97, 110 and/or 11 of the Schedule to Sarawak Limitation Ordinance (Cap 49) and/or s. 202 of the Sarawak Land Code (Cap 81) ('question (iii)') ('encl. 47'). The first and second
H appellants ('second and third defendants') applied for the determination of the question of law which was the same as question (iii) in encl. 47 ('encl. 52'). The defendants further sought the striking out of the plaintiff's claim, pursuant to O. 14A and O. 18 r. 19 of the Rules of Court 2012 ('ROC'), in the event the questions in encls. 47 and 52 are answered in their
I favour. The High Court answered question (i) in the affirmative and opined

that the claim was time-barred and disclosed no reasonable cause of action. The plaintiff's claim was struck out and summarily disposed. Hence, the present appeals.

Held (allowing appeals):

(1) Although the appellant had submitted, at length, in response to the issue of indefeasibility and limitation in his submission, it would not be necessary to dwell on them at this stage. At this stage, the pertinent issue to be dealt with was whether the action was suitable to be disposed of by way of O. 14A of the ROC. The present action was not suitable for disposal by way of O. 14A of the ROC. The relevant facts were clearly in dispute and it was not appropriate to determine the questions of law by relying on affidavit evidence alone. The order of the High Court was set aside. (paras 35, 36, 41 & 42)

Case(s) referred to:

*Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd & Other Appeals [2014] 7 CLJ 597 FC **(refd)***

Legislation referred to:

Land Code (Sarawak) (Cap 81), ss. 94(1), 95, 99, 132, 202
Limitation Ordinance (Sarawak) (Cap 49), Schedule items 29, 72, 97, 110, 112
Public Authorities Protection Act 1948, s. 2
Rules of Court 2012, O. 14A r. 1(5), O. 18 r. 19(1)(a), (b), (d), O. 32 r. 1, O. 33 r. 2, O. 92 r. 4

For the plaintiff - Clarice Chan & Eunice Ting; M/s Baru Bian Advocs
For the defendant - Anastasia Chin; M/s Reddy & Co Advocs

[Editor's note: Appeal from High Court, Limbang; Suit No: LMN-21-NCvC-2/5-2017 (overruled).]

Reported by Najib Tamby

JUDGMENT

Ismail Brahim J:

[1] There are two appeals before this court. These appeals were heard together as they involved the same subject matter and they arose out of the same suit in the High Court.

Appeal 521 (No. Q-01(IM)(NCVC)-521-08-2018)

[2] This is an appeal in respect of encl. 47 at the High Court where the appellant appeals against the decision of the learned High Court Judge where the High Court Judge granted the third defendant's application to strike out the plaintiff's claim.

[3] Enclosure 47 was the third defendant's application pursuant to O. 14A, O. 33 r. 2, O. 18 r. 19(1)(a), (b) & (d), O. 32 r. 1, O. 92 r. 4 of the Rules of Court 2012 (ROC).

[4] In encl. 47, the third defendant's application is for the determination of the following questions of law:

(i) Whether the third defendant being the registered proprietor of Lot. 349, Block 9, Trusan Land District ("the said land") has indefeasibility rights over the said land against the plaintiff's alleged NCR claim as delineated and shown in Map "M" of the plaintiff's amended writ and statement of claim dated 21 September 2017.

(ii) If the above question (i) is in the positive, whether the plaintiff could apply for or be entitled to the remedies, reliefs or orders prayed for in the amended statement of claim dated 21 September 2017 as against the third defendant title?

(iii) Whether the plaintiff's claims and reliefs sought are barred by reason of s. 2 of the Public Authorities Protection Act 1948 and or items 29, 72, 97, 110 and/or 112 of the Schedule to Sarawak Limitation Ordinance (Cap 49) and or s. 202 of the Sarawak Land Code (Cap 81).

Appeal 579 (Q-01(1M)(NCvC)-579-09-2018)

[5] In Appeal 579, the appellant is appealing against the decision of learned High Court Judge in allowing the first and second defendants' notice of application in encl. 52.

[6] In encl. 52, the first and second defendants' application is for the determination of the following questions of law:

(a) Whether the plaintiff's claims and reliefs sought are barred by reason of s. 2 of the Public Authorities Protection Act 1948 and/or items 29, 72, 97, 110 and/or 112 of the Schedule to Sarawak Limitation Ordinance (Cap. 49) and/or s. 202 of the Sarawak Land Code (Cap. 81) and

(b) Other relief deemed fit and proper by the court.

[7] The application in encl. 52 was premised on O. 14A, O. 33 r. 2, O. 18 r. 19(1)(a), (b) & (d) and O. 92 r. 4 of the ROC.

[8] As in the application in encl. 47, in encl. 52, the first and second defendants also sought that in the event the questions are answered in the affirmative or in favour of the defendants, the plaintiff's amended writ and statement of claim be struck out.

Brief Background Facts

[9] The appellant/plaintiff in this case is the native of Sarawak and of Lun Bawang race.

10] The first defendant is the Superintendent of Lands and Survey Kuching Division.

[11] The second defendant is the State Government of Sarawak.

[12] The third defendant is a statutory body within the second defendant's Government created under Land Custody and Development Ordinance 1984 and currently named as the registered proprietor of Lot 349, Block 9, Trusan Land District.

[13] In this case, it is the plaintiff's pleaded case that he has acquired or inherited native customary rights (NCR) over four parcels of Temuda land known as Field Lots No. 349, 682,702 and 722 Block 9, Trusan Land District ("NCR lands").

[14] In respect of the NCR lands, it was contended that the said NCR lands were acquired and/or created prior to 1 January 1958. In support of the plaintiff's claim, it was also pleaded among others that:

The plaintiff's grandfather was the first person who cleared and cultivated the said land and after the grandfather passed away, the right and interest in the said NCR lands was then inherited by the plaintiff's father. After the demised of his father, the said NCR lands were then inherited by the plaintiff.

[15] Based on the above, the plaintiff sought for a declaration that he had acquired and/or inherited native title and/or NCR over the said NCR lands and also for an order that the third defendant title over Lot 349 is unlawful, null and void.

Findings By The High Court In Enclosures 47 and 52

[16] The learned High Court Judge after hearing the application in encl. 47 and encl. 52 gave his grounds of decision in respect of both enclosures as follows:

(i) Enclosure 47:

> In relation to objection raised that the application was not proper and permissible in law as the third defendant had incorporated two applications in one ie, under O. 14A and O. 18 r. 19, he concluded that there was no basis in the objection. The learned judge was of the opinion that O. 14A r. 1(5) clearly allows for such an application. It was pointed out that the provision states that "nothing in this order shall limit the powers of the court under O. 18 r. 19 or any other provisions of these Rules".

(ii) In respect of the issue of indefeasibility of the title, the third defendant being the registered proprietor of the said Lot 349, the defendant had indefeasible title to it. Therefore, the answer to the first issue above is in the affirmative. The answer to the second issue is in the negative.

(iii) In regard to limitation, as the plaintiff was challenging the settlement exercise, the claim is time-barred and should be answered in the affirmative. It therefore follows that there was no reasonable cause of action in the claim.

[17] In respect of encl. 52 and on the issue of limitation, the learned judge based on the amended statement of claim and the reliefs sought for in the claim as well as the plaintiff's affidavit in opposition, the learned judge held that it was obvious that the plaintiff was challenging the settlement exercise.

[18] That being the case, the learned judge was of the opinion that the claim was time-barred. He concluded that the question in (a) should be answered in the affirmative. It therefore follows that there was no reasonable cause of action in this case and he accordingly struck out the plaintiff's claim.

Our Findings

[19] After having heard the parties, we agreed that both appeals should be allowed. We now give our reasons:

(i) In both encls. 47 and 52, although the defendants have cited various provisions of ROC as the basis of the application, however the application is primarily premised on O. 14A.

(ii) In *Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd & Other Appeals* [2014] 7 CLJ 597, the court stated that in an application of this nature, the court ought to consider the following:

(a) Whether the action is suitable to be disposed of by way of O. 14A application.

(b) Whether the material facts are not in dispute.

[20] Based on question (i) & (iii) in encl. 47 and question (a) in encl. 52, the following issues for determination in the questions are:

(i) Whether the third defendant being the registered proprietor of Lot 349 has indefeasibility rights over the said lands.

(ii) Whether the plaintiff's claims and reliefs sought are barred by reason of s. 2 of the Public Authorities Protection Act 1948 and/or items 29, 72, 97, 110 and/or 112 of the Schedule to Sarawak Limitation Ordinance (Cap. 49) and/or s. 202 of the Sarawak Land Code (Cap. 81).

[21] We will deal first with this issue of the third defendant's indefeasibility of title over the said lands. A

[22] In respect of encl. 47, the third defendant takes the position that since it is the registered proprietor of Lot 349, it has indefeasibility of rights over the said land and it premised its arguments that the plaintiff has no native customary rights over the said land. B

[23] In support, the third defendant relied on s. 94(1) of the Sarawak Land Code which states that:

> (1) The Settlement Officer shall investigate publicly all claims to State Land, whether based upon documentary evidence, native customary tenure or otherwise, and shall have power to determine in whose favour the rights to such land shall be shown in the Settlement Order made under Section 95 or may, in the case of conflicting claims, permit the parties to refer the determination of the same to arbitration under the Arbitration Act 1952 [Act 93]. C
>
> (See. Tab 19 of the Respondent's BOA) D

[24] Section 95 of the Sarawak Land Code states as follows:

> (1) After full investigation and final determination of all claims, the Settlement Officer shall make a Settlement Order which shall be in Form E in the First Schedule and shall contain any other particulars which may be prescribed by rules made under Section 213. E
>
> (2) Every Settlement Order shall be published in the *Gazette* and copies thereof shall, at the same time and for a period of one month thereafter, be exhibited at the office of the Superintendent in whose division, and at the office of the District Officer in whose district, the land is situated and at any other place which may be prescribed. F
> ...

[25] Based on the above provisions and the third defendant's contention that a full investigation and final determination of all claims over the relevant State lands, Lot 349 was determined by the settlement officer and settled as being unencumbered interior area land. It was pointed out that this is evident from the 1977 Settlement Order that was issued and gazetted in the Sarawak Government *Gazette* pursuant to s. 95 of the Sarawak Land Code. G

[26] Following the exercise, it was further contended that based on s. 99 of the Sarawak Land Code which provides that: H

> All land in any settlement area to which rights are not established by any claimant and registered in accordance with Section 112, other than land in respect of which a dispute has not been finally decided, shall belong absolutely to the Government and shall be entered as such in the Register. (See. Tab 21 of the RBOA) I

[27] The third defendant submits that Lot 349 belonged absolutely to the Sarawak Government from 1977. Further, in 1991, *vide* Trusan Land District (Native Area Land Declaration) (No. 2) Notification, 1991, the whole of Lot 349 was declared as native area land free of any encumbrances.

[28] Following the above contentions, it was submitted that the appellant's claim for alleged NCR in 2017 discloses no reasonable cause of action.

[29] On the arguments on the issue of indefeasibility, it was submitted that pursuant to s. 132 of the Sarawak Land Code, the third defendant being the registered proprietor of the said Lot 349, holds indefeasible title to it.

[30] The third defendant had cited various authorities to support the above proposition. We however, do not intend to dwell on the authorities cited in support as we are of the opinion that the present action is not suitable for disposal by way of O. 14A. Before addressing the position taken by the appellant, we briefly state the next point taken by the third defendant. It relates to the issue of limitation. It was argued before us that there was no application made by the appellant to challenge either the 1977 Settlement Order, the 1991 Trusan Land District Notification and/or the issuance of the lease/title over Lot 349 to the respondent on 10 December 1992.

[31] It was pointed out that the appellant's present action in respect of the NCR lands, ie, Lots No. 349, 682, 702 and 722, Block 9, Trusan Land District was filed in 2017.

[32] As the action was filed some 40 years after the 1977 Settlement Order, and/or 26 years after the 1991 Trusan Land District Notification and/or 25 years after the issuance of the lease/title to the respondent for Lot 349 in 1992 and there was no application which had been made by the appellant in respect of Lot 349 to challenge or quash or set aside the exercise of powers under the Sarawak Land Code by the first defendant and second defendant in respect of the Settlement Order, Trusan Land District Notification gazetted in the Sarawak Government *Gazette* dated 26 September 1991; and issuance of the lease over the said lot, the appellant's claim was caught by the limitation in the various legislation:

(i) Section 2 of the Public Authorities Protection Act 1948 ("PAPA 1948");

(ii) Items 29, 72, 97, 110 and/or 112 of the Schedule to the Sarawak Limitation Ordinance (Cap 49);

(iii) Section 202 of the Sarawak Land Code (Cap 81).

[33] In urging the court to allow the appeal, the appellant submitted as follows:

(i) Firstly, in response to the contention that he has no cause of action in claiming NCR upon the issuance and gazettement of the Settlement Order, the appellant contended that there was no notice issued to him nor that he has any knowledge over the matter. Further, he pleaded that Lot 349 was fraudulently issued to LCDA, by the Land Department, and contended that there was evidence that portions of Lot 349 were in fact cleared land. (see plaintiff's reply at pp. 50-52, RA 521).

(ii) Secondly, the appellant stood by his contention that the Temuda lots (the said lands) were first cleared and cultivated by his grandfather prior to the Japanese Occupation *circa* 1941.

(iii) Thirdly, the Temuda lots are now inherited by the plaintiff and his three siblings.

(iv) Fourthly, the appellant contends that based on the above facts, that there was no prior extinguishment of their NCR rights, and therefore it continues to subsist.

[34] In brief, the appellant is disputing that his rights of NCR had been extinguished. In other words, the relevant and material facts pertaining to the issues to be decided in the questions posed in both enclosures are in dispute.

[35] Although the appellant had submitted at length in response to the issue of indefeasibility and limitation in his submission, we are of the view that it would not be necessary to dwell on them at this stage. At this stage, in disposing of this appeal, it is necessary for us to only deal with the pertinent issue, ie, whether the action was suitable to be disposed of by way of an O. 14A application. In determining whether it is suitable to be disposed of by the same, the High Court must first determine that the relevant facts needed in arriving at the determination of the question of law posed in this case are not in dispute.

[36] Here, we are constraint to say that the relevant facts are clearly in dispute and it is not appropriate to determine the questions of law by relying on affidavit evidence alone.

[37] It is to be recalled that the appellant here not only claimed that he was not notified of the Settlement Order exercise or had knowledge of the same.

[38] He also claimed that the lands were cleared and cultivated by his father since 1941.

[39] Although the respondent contended that prior to the Settlement Order being made, an investigation of the of NCR's claim over the said lands was made, this evidence is disputed and it is also a relevant fact, which can only be established by way of hearing the evidence of witnesses in a full trial. With respect, we do not think that this matter can be decided purely based on averments in the affidavit.

[40] Another aspect of this case was the contention by the appellant that the said lands were cleared by his father since 1941. In order to determine whether there is any basis for the contention, again this matter which is disputed and a relevant factor in determining the questions posed is not suitable to be decided based merely on the averments of the third defendant or the appellant in the affidavit alone.

[41] Having reached our conclusion that the relevant facts are in dispute and that the matter for determination in question (i) and question (iii) in encl. 47 is not suitable to be dealt with by way of O. 14A, we are of the view that the question (a) in encl. 52 is similarly not suitable to be dealt by way of the same order.

[42] Based on all the above reasons, we allowed the appeals by the appellant in both cases and set aside the order of the High Court with costs.